"Irresistible Superhuman Cause"
Contractual Rights and Obligations in the Time of the Coronavirus Pandemic

"Law is good, and good law is good order."

--Aristotle, *Politics*

"The law is an ass."

--Charles Dickens, *Oliver Twist*[1]

As of this writing in early April 2020, we are witnessing a deepening global health and economic crisis. We are all focused on our loved ones and groceries and the latest news. But this too shall pass, and when it does, we will need to reckon with the legal and economic consequences of cancelled events, missed shipments, delayed construction projects and the like.

The coronavirus pandemic has disrupted, and will continue to disrupt, all aspects of commerce. Contract disputes will surely arise. But where a failure to fulfill contractual obligations is nobody's fault, how will the law allocate loss? The doctrines of force majeure and impracticability will play a major role in the outcomes of post-coronavirus contract disputes.

This article surveys California law[2] governing the twin defenses of force majeure and commercial impracticability (traditionally referred to as "impossibility").[3] The article then

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[1] The line is delivered in Dickens' dark tale of orphans and pickpockets by Mr. Bumble, but probably first appeared in a relatively obscure 17th century play, *Revenge for Honour*. James E. Clapp, Elizabeth G. Thornburg, Marc Galantar, Fred R. Shapiro, *Lawtalk: The Unknown Stories Behind Familiar Legal Expressions* (Yale Univ. Press, 2011).

[2] The law of other jurisdictions is largely similar, although the author has not conducted a detailed 50-state analysis on force majeure and impracticability. Nor does this piece address business interruption coverage issues, which turn on the specific language of the policies' terms and exclusions.

[3] Most commentators now use the term "impracticability" instead of "impossibility" to reflect the modern trend of excusing performance when events conspire to frustrate the purpose of the contract, even if it was not literally impossible to do what was required under the contract. *See, e.g.*, Restatement (Second) of Contracts, § 261, "Discharge by Supervening Impracticability" (1981). The impracticability doctrine also embraces the principle of "commercial frustration." *See, e.g., Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co.*, 85 Cal. App. 3d Supp. 44, 47-48 (1978).

evaluates how courts might apply these doctrines to contract disputes where performance was frustrated by the coronavirus pandemic.

The California Civil Code

Generally speaking, the law holds parties to their contractual promises, even when an obligor's personal circumstances prevent it from fulfilling its obligations.[4] But the law is not totally inflexible; it will bend to excuse non-performance when performance is *objectively* impossible. The California Civil Code defines objective impossibility with the maxim that "[e]verything is deemed possible except that which is impossible in the nature of things."[5]

Section 1511, in turn, provides that non-performance is excused "[w]hen it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of his state or of the United States, unless the parties have expressly agreed to the contrary."[6]

These broad statutory pronouncements leave it to the courts to decide which events constitute "irresistible, superhuman causes." Importantly, however, Section 1511 explicitly provides that parties agree that one party will bear the risk of an act of God or other irresistible force. Indeed, as discussed below, the precise language used in a commercial contract's force majeure clause will often dictate the outcome of a contract dispute.

The Case Law

In *Pacific Vegetable Oil Corp. v. C.S.T., Ltd*,[7] the California Supreme Court considered whether "force majeure" included events beyond natural disasters. In that case, the defendant

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[4] *See, e.g., Walker v. Ticor Title Co. of California*, 204 Cal. App. 4th 363, 372, n.10 (2012) (the doctrine of impossibility "excuses performance, not because a party has become financially unable to perform, but because performance itself has become impractical due to excessive and unreasonable expense") (quotations omitted); *Dale Evans Parkway 2012 LLC v. Nat'l Fire and Marine Ins. Co.*, 2016 WL 7486607, at * 5 (C.D. Cal. March 8, 2016) ("for performance to be excused, it must be objectively-not subjectively-impossible or impracticable").

[5] Cal. Civ. Code § 1597; *see also* Cal. Civ. Code § 1441 ("A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the Article on the Object of Contracts, or which is repugnant to the nature of the interest created by the contract, is void.")

[6] Cal. Civ. Code § 1511.

[7] *Pacific Vegetable Oil Corp. v. C.S.T., Ltd,*, 29 Cal. 2d 228 (1946).

agreed to ship a large quantity of copra (dried coconut kernels) from the Fiji Islands to San Diego. The contract, executed in November 1941, required the seller to deliver the copra by February 1942. On December 7, 1941, however, the Imperial Japanese naval forces attacked Pearl Harbor, and the United States entered World War II. Under the newly enacted wartime laws, the United States imposed restrictions on exports that prohibited the seller from delivering the copra in accordance with the terms of the supply agreement. The buyer initiated an arbitration action against the seller for breach of contract. When the arbitrators entered an award in favor of the seller, the buyer sued to vacate the award on the ground that World War II was not an act of God.

The California Supreme Court upheld the arbitration award, finding that the buyer's interpretation of a force majeure was too narrow. The Court held that:

> The test is whether under the particular circumstances there was an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care.[8]

But while *Pacific Vegetable Oil* settled the question that a "force majeure" event includes circumstances beyond natural calamities, the impracticability/force majeure defense has important limits:

- *Subjective impracticability is not a defense.*

A defendant asserting an impracticability defense, or invoking a force majeure clause, must establish that performance was prevented by an "irresistible, superhuman force" that made it objectively impracticable to perform. As noted, the California Supreme Court upheld the defense award in *Pacific Vegetable Oil* because circumstances beyond the supplier's control prevented performance.

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[8] *Id.* at 238; *see also, e.g.*, *Schwan v. Permann*, 28 Cal. App. 5th 678, 695 (2018) (defendants' performance excused where continued employment with company was impossible after assets of company were sold); *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473 (1953) (City was entitled to invoke force majeure clause where federal government unexpectedly put a stop to the work that was the subject of the contract).

By contrast, the law will reject a force majeure defense based on the inability of the promisor to perform because of its own individual circumstances, especially if the problem is of its own making.[9] For example, the Court of Appeal rejected the City of Los Angeles' defense when it cancelled a construction contract because the project was "impossible" after the City failed to secure the necessary entitlements from the State of California before committing to the project.[10] Applying the same principle, a federal district court held that a performer's unanticipated incarceration did not excuse his failure to appear at a concert.[11]

- *Force majeure will not save a party from bad business outcomes.*

Unforeseen difficulty or expense in fulfilling contractual promises also will not, without more, excuse performance. As the Court of Appeal has explained, a "force majeure clause is not intended to buffer a party against the normal risks of a contract."[12] There was therefore no force majeure defense available for a racetrack that promised a pay-out that exceeded the amount collected in race day bets, even when the low betting revenue was an anomaly.[13] Nor did the California Supreme Court allow a defendant to invoke a clause excusing performance in the event of a "strike, lockout, or other labor trouble" when performance of the contract merely posed a threat of future labor troubles.[14] The lesson from this line of cases is that when the

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[9] *See* note 3, *supra*.

[10] *Hensler*, 124 Cal. App. 2d at 83.

[11] *World Mix Entertainment, Ltd. v. Bone Thugs Harmony, Inc.*, 2009 WL 10671949, at *5 (C.D. Cal. March 3, 2009).

[12] *Horsemen's Benevolent & Protection Assn v. Valley Ranch Assn.*, 4 Cal. App. 4th 1538, 1565 (1992); *Peoplesoft U.S.A. Inc. v. Softeck, Inc,*, 227 F. Supp. 2d 1116, 1118 (N.D. Cal. 2002) (defendant assumed risk that it would be unable to sell the software it licensed from plaintiff)

[13] *Id.*

[14] *Oosten v. Hay Haulers Dairy Employees v. Helpers Union*, 45 Cal. 2d 784, 789 (1955).

commercial bargain turns out worse than anticipated for one of the contracting parties, the party must take its lumps and still do what it promised.[15]

- *The party invoking force majeure must have exercised diligence.*

The *Pacific Vegetable Oil* decision contains an important caveat: the party relying on a force majeure defense must establish that it exercised "prudence, diligence and care."[16] This issue arose in *Holt Manufacturing Co. v. Thorton*,[17] where the contractor argued that a hurricane prevented it from harvesting the farm owner's grain. The California Supreme Court rejected the force majeure defense because the evidence showed that the contractor had started its work late. If the contractor had started on the day appointed in the contract, it could have completed its work before the hurricane struck.[18] Diligence also requires that a party undertake all reasonable measures to meet its contractual obligations. For example, where the evidence established that a paper supplier did not attempt to obtain the necessary materials from a third party, it was precluded from invoking the force majeure clause.[19]

- *The duty resumes when the crisis ends.*

The occurrence of a superhuman event does not necessarily excuse performance completely. The general rule is that "partial impossibility ordinarily discharges the duty only to

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[15] *Kashmiri v. Regents of Univ. of California*, 156 Cal. App. 4th 809, 839 (2007) ("economic crises do not excuse performance on a contract. Facts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility.") (quotation and citations omitted); *but see City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 720 (1955) (affirming trial court's finding that performance was excused by doctrine of impracticability where unforeseen circumstances made contemplated construction of sewage facilities excessively costly); *Federal Leasing Consultants, Inc.*, 85 Cal. App. 3d Supp. at 48 (1978) (finding that doctrine of commercial frustration excused performance when security system was rendered inoperable when federal government prohibited use of radio frequencies used by system); *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336-37 (2009) (developer's obligation to convey land was potentially excused under doctrine of impossibility where recipient trust was determined not to qualify to hold the land)

[16] *Pacific Vegetable Oil Corp. v. C.S.T., Ltd,*, 29 Cal. 2d at 238.

[17] 136 Cal. 232 (1921).

[18] *Id.* at 235.

[19] *Jin Rui Group, Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 Fed. Appx. 511 (2015).

the extent thereof."[20] So if the contract can still be partially performed, the law expects that the party will do so. In a similar vein, if the situation giving rise to impossibility is temporary, the parties may be expected to perform once the crisis abates.[21] Finally, if a party has partially performed when conditions have rendered completion of its duties impracticable, the party may generally recover the value of its partial performance.[22]

- *The force majeure defense is often a question of fact.*

The interpretation of a force majeure clause requires a review of the facts of the particular dispute. The closely related impracticability common-law defense likewise involves an analysis of the specific facts of the case. For this reason, these defenses may not usually be resolved by dispositive motion.[23]

Will the Coronavirus Pandemic Excuse Contractual Performance?

The specific language of a force majeure clause will frame any dispute about whether performance of a contract is excused. But in the absence of a force majeure provision, or when the provision is subject to more than one interpretation (which is often the case), courts will draw upon the authorities discussed above to make its judgment, or to instruct the jury on the law. While the outcome of every case will depend on its own facts, many of these force majeure cases will confront these common questions:

- *Is the pandemic a force majeure rendering performance impossible?*

A plaintiff opposing a coronavirus defense could argue that performance was still possible. The defendant, the argument would go, could have implemented appropriate

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[20] 1 Witkin, Summary of California Law, Contracts § 859 (11th ed. 2019) (citing to Restatement (Second) of Contracts, § 270.)

[21] *Id.*; *Maudlin v. Pacific Decision Sciences Corp.*, 137 Cal. App. 4th 1001, 1017 (2006) (directing trial court on remand to determine when and to what extend impossible condition existed); *see also Okada v. Whitehead*, 2016 WL 9448482, at *11-12 (C.D. Cal. Nov. 4, 2016) (California follows rule that temporary impracticability suspends obligation to perform while impossible or impracticable).

[22] 1 Witkin, Summary of California Law, Contracts § 859.

[23] *See, e.g., Emelianenko v. Affliction Clothing*, 2011 WL 13176615, at *28 (C.D. Cal. June 7, 2011) (denying summary judgment because jury could decide that it was possible to perform under contract).

precautions and still honored the contact. These measures may make performance of the contract more expensive or inconvenient, but additional expense and inconvenience do not excuse performance. Why should the aggrieved contractual party bear the loss of the bargain?

In most situations, this argument probably will not fly. First, federal, state and local governments have imposed restrictions on commercial activities, including orders requiring "non-essential" businesses from ceasing all activities in public spaces.[24] These emergency orders, like the wartime laws at issue in *Pacific Vegetable Oil*, render performance of contracts objectively "impossible."[25] Second, for all of its faults, the law is not "an ass," as the saying goes. Generally speaking, judges are reasonable people who seek to achieve just and commonsense outcomes. And any reasonable person would conclude that the coronavirus pandemic constitutes a force majeure as terrible and disruptive as any hurricane, earthquake or war in recent history.

- *Does the contract allocate risk?*

It does not necessarily follow, however, that the non-performing party is off the hook. The success of the defense may depend on the specific force majeure language.[26]

Some force majeure provisions explicitly include "diseases," "epidemics" and "quarantines" as a force majeure events that excuse performance. Other contracts, however, shift the risk to one of the parties in all circumstances, including worldwide pandemics. In such cases, courts may consider the bargaining powers of the parties and whether such provisions are

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[24] *See, e.g.,* California Executive Order N-33-20, March 19, 2020 (directing all Californians to stay home unless they work in certain enumerated "infrastructure sectors"); Public Order Under City of Los Angeles Emergency Authority, March 19, 2020 ("All businesses within the City of Los Angeles are ordered to cease operations that require in-person attendance.").

[25] If, however, the contract involves providing goods or services to "critical infrastructure services," an impossibility defense probably will not be available.

[26] *See, e.g., San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership*, 85 Cal. App. 4th 401, 411-12 (1998) (finding that force majeure clause was limited to conditions specified therein) *LECG, LLC v. Unni*, 2014 WL 2186734, at *7-8 (N.D. Cal. May 23, 2013) (doctrine not applicable where contract expressly allocated risk and such intervening event was contemplated by the contract).

procedurally and substantively unconscionable.[27] Although the standard for establishing unconscionability in commercial contracts is theoretically the same as the showing for consumer contracts,[28] a defendant must still show "a substantial degree of unfairness beyond 'a simple old-fashioned bad bargain.'"[29] While the outcome will depend on the particular facts of the case, the unconscionability hurdle will be too high for most defendants to clear.

- *Has the party asserting the defense exercised diligence?*

The party seeking to be excused from performance by reason of force majeure or impracticability must establish that it exercised prudence, diligence and care.[30] In deciding a force majeure/impracticability defense, the trier of fact may consider whether the defendant could have or should have fulfilled its obligations before governmental authorities issued stay-at-home orders. Given the nature of the coronavirus pandemic, it is difficult to conceive of many scenarios where a party's lack of diligence precludes a force majeure defense.

- *Is partial performance required?*

For some contracts, like agreements related to special events scheduled for a specific date (a St. Patrick's Day concert, for example), the coronavirus epidemic likely will be a complete defense to a breach of contract action. But for other contracts, partial or delayed performance may be required. Could some of the work be done safely at home? Could performance be delayed until after the epidemic is resolved and the stay-at-home orders lifted? If the answer to either question is yes, partial or delayed performance may be required, even if such performance engenders greater cost or inconvenience to the party required to perform.

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[27] Cal. Civ. Code § 1670.5; *Mohamed v. Uber Technologies*, 848 F.3d 1201, 1210 (9thCir. 2016).

[28] *Walnut Producers of California v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 643 (2010).

[29] *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1245 (2016).

[30] *Pacific Vegetable Oil Corp.*, 121 Cal. 2d at 238; *see also Horsemen's,* 4 Cal. App. 4th at 1564.

- *Rescission and restitution*

If the court accepts the defendant's impracticability or force majeure defense, the plaintiff will usually be entitled to rescission and restitution.[31] In other words, the plaintiff should likewise be relieved of any obligations under the contract and be compensated for any payments made or costs expended so that both parties are restored to their pre-agreement positions.[32] A court sometimes may order partial rescission, but only if the contract lends itself to being separated into divisible agreements.[33]

The coronavirus pandemic has upended all facets of life. Someday soon (hopefully), we will return to our daily routines and begin picking up the pieces. For many businesses, the starting point will be to evaluate whether and to what extent they have recourse for the economic disruptions caused by the pandemic. A key component of this commercial triage is to analyze all current contracts — including leases, personal service agreements, event contracts — and to determine if a force majeure provision or common law impracticability defense excuses performance.

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[31] Cal. Civ. Code 1689(b)(4) ("A contract may be rescinded if...the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause."; 1 Witkin, Summary of California Law, Contracts § 854 (11th ed. 2019); Cal. Civ. Prac. Business Litigation, § 30:17 (2020).

[32] Cal. Civ. Code §§ 1688 ("a contract is extinguished by its rescission"), 1692 (in action for rescission, "the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."); *Shapiro v. Ogle*, 28 Cal. App. 3d 261, 267-68 (1972) (recovery of down payment and prepayment permitted where both parties sought rescission of the contract)

[33] *Simmons v. Cal. Institute of Technology*, 34 Cal. 2d 264, 275 (1949) (finding that party could rescind royalty agreement as to one party but not the other); *IMO Development Corp. v. Dow Corning Corp.*, 135 Cal. App. 3d 451, 458-59 (1982) (finding that partial rescission was not appropriate where agreement was intended by the parties to be treated as a single agreement).